

UNITED STATES DISTRICT COURT
Northern District of California

GERALDINE P. SUELEN

No. C-13-002 MEJ

Plaintiff,

ORDER REMANDING CASE

v.

WELLS FARGO BANK, N.A.; GOLDEN
WEST SAVINGS ASSOCIATION SERVICE,
CO., A CALIFORNIA CORPORATION; CAL-
WESTERN RECONVEYANCE
CORPORATION, et al.,

Defendants.

I. INTRODUCTION

Plaintiff Geraldine Suelen filed suit against Defendants Wells Fargo Bank, N.A. (“Wells Fargo”), Golden West Savings Association Service, Co. (“Golden West”), and Cal-Western Reconveyance Corporation (“Cal-Western”) in Contra Costa County Superior Court for alleged misconduct relating to the foreclosure on her property. Not. of Rem. at 2, Dkt. No. 1. Wells Fargo and Golden West removed the action to this Court based on diversity of citizenship, pursuant to 28 U.S.C. § 1332. *Id.* at 1-2. Now pending before the Court are Wells Fargo and Golden West’s Motion to Dismiss and Ms. Suelen’s Motion to Remand. Dkt. Nos. 8, 11. Upon consideration of the papers submitted, the Court **REMANDS** the action back to Contra Costa County Superior Court because the Court lacks subject-matter jurisdiction over it.¹

¹ Pursuant to this District’s Civil Local Rule 7-1(b), the Court finds this matter suitable for determination without oral argument.

II. BACKGROUND

The relevant facts are taken from Ms. Suelen's Complaint and certain public records of which the Court takes judicial notice.² This action arises out of a residential home loan for a

2

Wells Fargo and Golden West ask the Court to take judicial notice of the following documents: (1) a letter, dated November 19, 2007, from Nicholas Dyer, Assistant Regional Director, Office of Thrift Supervision to John Stoker, Vice President and Assistant General Counsel, Wachovia Corporation confirming that World Savings Bank changed its name to Wachovia Mortgage, FSB; (2) an official certification of the Comptroller of the Currency confirming Wachovia Mortgage, FSB's conversion to a national bank with the name Wells Fargo Bank Southwest, N.A., and Wells Fargo Bank Southwest, N.A.'s merging with and into Wells Fargo Bank, N.A.; (3) a Chapter 7 bankruptcy petition filed on July 6, 2010 in the United States Bankruptcy Court, Northern District of California and identified as Case No. 10-48053; (4) an order granting motion for relief from automatic stay entered on October 21, 2010 in the United States Bankruptcy Court, Northern District of California and identified as Case No. 10-48053; (5) an order of dismissal entered on November 4, 2010 in the United States Bankruptcy Court, Northern District of California and identified as Case No. 10-48053; (6) a Chapter 7 bankruptcy petition filed on December 3, 2010 in the United States Bankruptcy Court, Northern District of California and identified as Case No. 10-73926; (7) an amended summary of schedules filed on December 8, 2010 in the United States Bankruptcy Court, Northern District of California and identified as Case No. 10-73926; (8) an order granting motion for relief from automatic stay entered on April 4, 2011 in the United States Bankruptcy Court, Northern District of California and identified as Case No. 10-73926; (9) a discharge of debtor entered on March 15, 2011 in the United States Bankruptcy Court, Northern District of California and identified as Case No. 10-73926; (10) a notice of trustee sale, dated July 19, 2011 and recorded in the official records of the Office of the Contra Costa County Recorder on July 25, 2011 and identified as Document No. 2011-0145937-00; (11) a Chapter 13 bankruptcy petition filed on November 23, 2011 in the United States Bankruptcy Court, Eastern District of California and identified as Case No. 11-72360; (12) an order of dismissal entered on December 20, 2011 in the United States Bankruptcy Court, Northern District of California and identified as Case No. 11-72360; (13) a Chapter 13 bankruptcy petition filed on February 6, 2012 in the United States Bankruptcy Court, Northern District of California and identified as Case No. 12-41086; (14) an order of dismissal entered on February 23, 2012 in the United States Bankruptcy Court, Northern District of California and identified as Case No. 12-41086; (15) a Chapter 13 bankruptcy petition filed on March 21, 2012 in the United State Bankruptcy Court, Northern District of California and identified as Case No. 12-42498; (16) an order dismissing the case prior to confirmation with a 6 month bar to refiling in the United States Bankruptcy Court, Northern District of California identified as Case No. 12-42498; (17) a trustee's deed upon sale, dated August 7, 2012 and recorded in the official records of the Office of the Contra Costa County Recorder on August 9, 2012 as Document No. 2012-0191931-00; and (18) a notice of voluntary dismissal filed on November 8, 2012 in the United States District Court, Northern District of California and identified as Case No. 3:12-cv-05219-JSW. Dkt. No. 9.

The Court may take judicial notice of matters of public record. *Lee v. City of L.A.*, 250 F.3d 668, 689 (9th Cir. 2001); *see* Fed.R.Civ.P. 201(d). The Court can take judicial notice of documents reflecting official acts of the executive branch of the United States, pursuant to Rule 201(b)(2). *Hite v. Wachovia Mortgage*, 2010 U.S. Dist. LEXIS 57732, at *6-9 (E.D. Cal. June 10, 2010). Furthermore, judicial notice is appropriate for information obtained from government websites. *Paralyzed Veterans of Am v. McPherson*, 2008 U.S. Dist. LEXIS 69542, at *17-18 (N.D. Cal. Sept.

1 personal residence located at 1725 Liberty Street, #5, El Cerrito, California 94530 (“the Property”).
 2 Compl. ¶ 10, Dkt. No. 1-2. Pursuant to a residential home loan, on October 7, 2004, Ms. Suelen
 3 executed a Deed of Trust on the Property. *Id.* ¶ 11. The Deed of Trust listed World Savings Bank,
 4 FSB as the beneficiary and Golden West as the trustee. *Id.*

5 In or around January 2008, World Savings Bank, FSB changed its name to Wachovia
 6 Mortgage, FSB, which then merged into Wells Fargo Bank, N.A. in November 2009. Req. for Jud.
 7 Not., Exs. A-B, Dkt. No. 9.

8 Beginning in 2009 and continuing thereafter, Ms. Suelen contends that she was negotiating
 9 or attempting to negotiate a loan modification with Wells Fargo and that she and her agent
 10 repeatedly contacted Wells Fargo by telephone, e-mail, and otherwise. Compl. ¶ 19. Ms. Suelen
 11 alleges that she and her agent repeatedly inquired whether these loan modification negotiations
 12 would hold off any foreclosure sale and, if not, then what would be the date of the actual trustee’s
 13 sale so that Ms. Suelen would be able to take necessary steps to protect her rights and save the
 14 subject property. *Id.* Ms. Suelen alleges that Wells Fargo assured her that no foreclosure sale would
 15 take place during these loan modification negotiations and that they would certainly apprise her of
 16 any sale date should Wells Fargo reject the loan modification negotiations. *Id.* Ms. Suelen contends
 17 that Wells Fargo subsequently rejected the loan modification negotiations without notice to her and
 18 refused to divulge the trustee’s sale date. *Id.*

19 On July 31, 2009, a notice of default was recorded against Ms. Suelen and the subject
 20 property by acting trustee Cal-Western.³ *Id.* ¶ 12. Cal-Western subsequently filed multiple Notices
 21 of Trustee’s Sale and Trustee’s Deed Upon Sale. *Id.* ¶¶ 13-18. In response, Ms. Suelen filed five
 22 bankruptcy petitions. Req. for Jud. Not., Exs. C, F, I, K, M, Q. However, the bankruptcy court

23 8, 2008) (court took judicial notice of information appearing on and printed from official
 24 government websites -- citing numerous decisions from federal circuits and district courts all
 25 approving judicial notice of information obtained from government websites).

26 ³ Although no party submitted a notice of substitution of trustee showing that Cal-Western took
 27 over as trustee from Golden West before the notice of default was recorded, the substitution of trustee
 (recorded on November 2, 2009, as Document No. 2009-0260810-00) shows that the substitution was
 executed on July 30, 2009. Not. of Rem. at Ex. A.

eventually barred Ms. Suelen from filing any additional bankruptcy petitions for six months. Req. for Jud. Not., Ex. P. Thereafter, Wells Fargo completed the foreclosure of the subject property on July 19, 2012.⁴ Compl. ¶ 18.

Ms. Suelen instituted this action in Contra Costa County Superior Court on December 20, 2012. Not. of Rem. at 2. Ms. Suelen brought the following causes of action against “all defendants”: (1) wrongful foreclosure; (2) intentional fraud; (3) negligent fraud; (4) breach of implied covenant of good faith and fair dealing; (5) intentional infliction of emotional distress; (6) negligence; (7) violation of California Business and Professions Code § 17200, et seq; (8) cancellation of instrument; (9) quiet title; (10) declaratory relief; and (11) injunctive relief. Compl.

On January 2, 2013, Wells Fargo and Golden West removed the action to this Court, claiming diversity jurisdiction. Not. of Rem.; see 28 U.S.C. § 1332. Wells Fargo and Golden West subsequently moved to dismiss Ms. Suelen’s Complaint on January 24, 2013. Dkt. No. 8. On February 1, 2013, Ms. Suelen moved to remand this matter back to the Contra Costa County Superior Court based on lack of complete diversity. Dkt. No. 11. Because the Court finds that jurisdiction is lacking, it turns to the Motion to Remand first.

III. DISCUSSION

A. Subject-Matter Jurisdiction

Federal courts are of limited jurisdiction, and have subject matter jurisdiction only over matters authorized by the Constitution and Congress. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). Diversity jurisdiction requires all plaintiffs to have different citizenship from all defendants and that the amount in controversy exceeds \$75,000. 28 U.S.C. § 1332; *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373 (1978). “The strong presumption against removal jurisdiction means that the defendant always has the burden of establishing that removal is proper.” *Gaus v. Miles*, 980 F.2d 564, 566 (9th Cir. 1992) (internal quotations omitted). “Courts should resolve doubts as to removability in favor of remanding the case to state court.” *Id.*

⁴ The trustee’s deed upon sale was recorded on August 9, 2012, with a sale date of July 19, 2012 and sales price of \$125,727.00. Compl. ¶ 18.

2. The Complete Diversity Requirement

There is no dispute that Wells Fargo is a citizen of South Dakota and that Plaintiff, Golden West, and Cal-Western are California citizens. Mot. at 12, Dkt. No. 11; Opp. at 6, Dkt. No. 16. Ms. Suelen argues that the fact that she, Golden West, and Cal-Western are all California citizens destroys diversity jurisdiction. Mot. at 2. However, Defendants argue that neither Golden West nor Cal-Western's California citizenship defeats diversity jurisdiction because they are fraudulently joined, or nominal, parties. Opp. at 6.

While diversity jurisdiction under 28 U.S.C. § 1332 ordinarily requires complete diversity of the parties, removal is proper despite the presence of a non-diverse defendant when that defendant was fraudulently joined. *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68 (1996); *McCabe v. Gen. Foods*, 811 F.2d 1336, 1339 (9th Cir. 1987) (a fraudulently joined defendant will not defeat diversity jurisdiction). In the Ninth Circuit, if a plaintiff "fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state, the joinder of the resident defendant is fraudulent." *McCabe*, 811 F.2d at 1339. There is a strong presumption against fraudulent joinder, and a defendant who asserts it "carr[ies] a heavy burden of persuasion." *Lieberman v. Meshkin, Mazandarani*, 1996 WL 732506, at *2 (N.D. Cal. Dec.11, 1996) (citing *Boyer v. Snap-on Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990)). "Indeed, [a defendant] must show to 'a near certainty' that joinder was fraudulent and that 'plaintiff has *no actual intention to prosecute* an action against [that] particular resident defendant[].'" *Osorio v. Wells Fargo Bank*, 2012 WL 2054997, at *2 (N.D. Cal. June 5, 2012) (quoting *Diaz v. Allstate Ins. Group*, 185 F.R.D. 581, 586 (C.D. Cal. 1998) (emphasis in original) (citing *Boyer*, 913 F.2d at 111)); *see also Lewis v. Time, Inc.*, 83 F.R.D. 455, 466 (E.D. Cal. 1979), *aff'd*, 710 F.2d 549 (9th Cir. 1983).

"The defendant seeking removal to the federal court is entitled to present the facts showing the joinder to be fraudulent." *McCabe*, 811 F.2d at 1339. A non-diverse defendant is deemed to be fraudulently joined if, after all disputed questions of fact and all ambiguities in the controlling state law are resolved in the plaintiff's favor, the plaintiff could not possibly recover against the party

1 whose joinder is questioned. *Kruso v. Int'l Tel. & Tel. Corp.*, 872 F.2d 1416, 1426 (9th Cir. 1989).
2 “In order to establish that there has been no fraudulent joinder, a plaintiff need only have one
3 potentially valid claim against a non-diverse defendant” to survive a fraudulent joinder challenge.
4 *Knutson v. Allis-Chalmers Corp.*, 358 F.Supp.2d 983, 993-95 (D. Nev. 2005) (collecting cases).
5 Accordingly, a defendant seeking removal based on an alleged fraudulent joinder must do more than
6 show that the complaint at the time of removal fails to state a claim against the non-diverse
7 defendant. *Burris v. AT & T Wireless, Inc.*, 2006 WL 2038040, at *2 (N.D. Cal. July 19, 2006)
8 (citing *Nickelberry v. DiamlerChrysler Corp.*, 2006 WL 997391, at *1-2 (N.D. Cal. Apr. 17, 2006)
9 (remanding action where defendant failed to demonstrate that the plaintiff would not be given leave
10 to amend to cure the pleading deficiency regarding the alleged sham defendant)). “Remand must be
11 granted unless the defendant shows that the plaintiff ‘would not be afforded leave to amend his
12 complaint to cure [the] purported deficiency.’” *Padilla v. AT&T Corp.*, 697 F.Supp.2d 1156, 1159
13 (C.D. Cal. 2009) (quoting *Burris*, 2006 WL 2038040, at *2).

14 Here, the Court finds that Ms. Suelen has not sufficiently alleged claims against Golden West
15 or Cal-Western for wrongful foreclosure and quiet title. Courts in this district have uniformly held
16 that a plaintiff cannot state a claim challenging the foreclosure process where a foreclosure sale has
17 already occurred, as it has here. *See, e.g., Garbutt v. Adamarc Financial Co., Inc.*, 2011 WL
18 2784548, at *2-3 (N.D. Cal. July 13, 2011); *Davenport v. Litton Loan Servicing, LP*, 725 F.Supp.2d
19 862, 877-78 (N.D. Cal. 2010); *Aguilera v. Hilltop Lending Corp.*, 2010 WL 3340566, at *4-5 (N.D.
20 Cal. Aug. 25, 2010); *Atkins v. Litton Loan Servicing, LLP*, 2010 WL 3184350, at *4 (N.D. Cal.
21 Aug.11, 2010). With respect to her claim to quiet title, Golden West and Cal-Western do not claim
22 any interest in the subject property. Thus, under California law, it is “obvious” Ms. Suelen cannot
23 now state a quiet title claim against them. *McCabe*, 811 F.2d at 1339.

24 But it is not so clear with respect to Ms. Suelen’s remaining claims. It is true that Ms.
25 Suelen’s allegations primarily focus on the conduct of Wells Fargo. It also is true that her
26 allegations concerning Golden West and Cal-Western primarily focus on their role as trustees.
27 Nevertheless, Ms. Suelen does bring all of her claims against “all defendants,” including Golden
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1 West and Cal-Western. And, even if Ms. Suelen's allegations do not meet the necessary pleading
2 requirements now, Defendants have not shown, as they must, that she could not re-allege at least one
3 of them to do so. *Padilla*, 697 F.Supp.2d at 1159 ("Remand must be granted unless the defendant
4 shows that the plaintiff 'would not be afforded leave to amend his complaint to cure [the] purported
5 deficiency.'") (quoting *Burris*, 2006 WL 2038040, at *2). In this circumstance, the Court finds that
6 Defendants have not carried their "heavy burden of persuasion," *Lieberman*, 1996 WL 732506, at
7 *2, to show to "a near certainty" that joinder was fraudulent and that Ms. Suelen "has *no actual*
8 *intention to prosecute* an action" against Golden West and Cal-Western. *Diaz*, 185 F.R.D. at 586
9 (emphasis in original); *Osorio*, 2012 WL 2054997, at *2. Accordingly, the Court concludes that
10 Golden West and Cal-Western have not been fraudulently joined and that Defendants' removal of
11 this action was improper.

12 **B. Motion to Dismiss**

13 Because the Court concludes that it does not have subject-matter jurisdiction over this
14 dispute (because there is no complete diversity), the Court does not address the merits of
15 Defendants' Motion to Dismiss.

16 **C. Request for Attorneys' Fees and Costs**

17 In her Motion, Ms. Suelen requests that the Court order the removing Defendants to pay her
18 costs and expenses incurred as a result of their improper removal. Mot. at 21. "Absent unusual
19 circumstances, courts may award attorney's fees under § 1447(c) only where the removing party
20 lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively
21 reasonable basis exists, fees should be denied." *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 141
22 (2005); *Gardner v. UICI*, 508 F.3d 559, 560-563 (9th Cir. 2007) (defendant removed on the basis
23 that a defendant was fraudulently joined because all of the claims against him were time-barred;
24 court found that defendant "had an objectively reasonable basis for removal to federal court," and
25 the district court abused its discretion in awarding fees and costs to the plaintiff under 28 U.S.C. §
26 1447(c)). Here, the Court finds it was reasonable for Defendants to attempt removal based on Ms.
27 Suelen's Complaint as pled and their argument that Golden West and Cal-Western were not

involved in the foreclosure at issue. Therefore, the Court DENIES Ms. Suelen's request for attorneys' fees and costs.

IV. CONCLUSION

Based on the foregoing, the Court REMANDS this action back to Contra County Superior Court. The Clerk of Court shall close the file.

IT IS SO ORDERED.

Dated: April 1, 2013



Maria-Elena James
United States Magistrate Judge

